No. 12,438

IN THE

United States Court of Appeals

For the Ninth Circuit

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, Executor of the Last Will and Testament of Sanford Plummer, Deceased; CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, Executor of the Last Will and Testament of Caroline Alice Plummer, Deceased, as an individual and distributee; CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, as trustee and distributee of the Estate of Sanford Plummer, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Northern District of California.

BRIEF FOR THE UNITED STATES.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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OPINION BELOW.

The District Court's findings of fact (R. 3-19), conclusions of law (R. 22-23), and opinion contained in its "Order for Judgment" (R. 20-22) are not yet reported.

JURISDICTION.

The Commissioner determined a deficiency in estate tax against the estate of Sanford Plummer, deceased, in the amount of $21,874.78, which, with interest, was paid on January 12, 1943, by appellant as executor of the estate. (R. 11.) A timely claim for refund was filed on March 31, 1944 (R. 11-12), and rejected on August 31, 1944. (R. 12, 17-18.) This suit for refund was instituted on July 18, 1946, within the time provided by Section 3772 of the Internal Revenue Code. The District Court had jurisdiction of the case under 28 U.S.C., Section 1346(a)(1), the Collector of the tax not being in office at the time the suit was commenced. (R. 11.) Judgment of dismissal, with costs, was entered by the District Court on August 3, 1949. (R. 24-25.) Motions for a new trial, to open the judgment, amend the findings of fact and conclusions of law, and for the entry of a new judgment were denied on September 22, 1949. (R. 25.) Notice of appeal was filed September 30, 1949 (R. 25-27), and properly invoked the jurisdiction of this Court under 28 U.S.C., Section 1291.

QUESTION PRESENTED.

Whether paragraph Second of the decedent's will constituted an agreement between the decedent and his wife which operated to convert their "old type" community property into "new type" community property as of the date of execution of the will, with the result that only one-half of the property in the decedent's name at his death is includible in his gross estate for estate tax purposes under Section 811(a) of the Internal Revenue Code.

STATUTE INVOLVED.

Internal Revenue Code:

Sec. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * * * * * *

(26 U.S.C. 1946 ed., Sec. 811.)

STATEMENT.

The findings of fact of the District Court (R. 3-19) may be summarized as follows:

Sanford Plummer (hereinafter referred to as the decedent) and Caroline Alice Plummer were married in California on March 1, 1904. They lived together as husband and wife, and as residents of California, from the time of their marriage until the decedent's death on May 23, 1941. (R. 7.) The decedent left a will which was admitted to probate on June 17, 1941, and under which appellant has since that time served as executor of the decedent's estate.[1] (R. 3-4.) In the estate tax return filed for the estate, appellant returned only one-half of the property owned by the decedent and his wife at the time of the decedent's death. (R. 9-10.) The Commissioner determined an estate tax deficiency of $21,874.78 on the basis of his determination that not more than 20 percent of the property owned by the decedent and his wife at the time of the decedent's death was community property in which the wife had a present, existing and equal interest. (R. 10-11, 17-18.)

The decedent had filed individual federal income tax returns for the calendar years 1939-1940 and for prior years in which he reported only 20 percent of the income received by him on investments in stocks

[1] Appellant was at first co-executor with Caroline Alice Plummer, who died on December 9, 1949. (Br. 2.) By an order of this Court of January 30, 1950, the action was continued as set out in the caption.

and bonds as community income divisible with his wife. (R. 12, 19.) The income tax returns for 1939 and 1940 contained the following statements, (R. 13):

> This taxpayer contends that substantially all of his income from dividends constitutes community income in which his wife has a one-half interest. On the basis of revenue agents' reports, covering examinations of taxpayer's income tax return and those of his wife for the years 1935 to 1937, only 20% of income on the above securities is reported as community income.
>
> This taxpayer contends that substantially all of his interest income constitutes a community income in which his wife has a vested one-half interest. In order to avoid a controversy on the basis of revenue agents' reports covering examinations of this taxpayer's income tax returns for the years 1935 to 1937, only 20% of the income on the above securities was reported as community income in this return.

In this connection it was stipulated at the trial that if Scott Dunham, the accountant who prepared the decedent's tax returns, were called as a witness he would testify as follows, (R. 13-16):

> "I am now, and for some years last past, have been associated with John F. Forbes & Company, certified public accountants, with offices in the City of San Francisco, and elsewhere throughout the United States.
>
> "I personally knew Sanford Plummer, a resident of the County of Alameda, State of California, who died on May 23, 1941.

"The said Sanford Plummer engaged the services of the said John F. Forbes & Company to prepare his Federal and California individual income tax returns and those of his wife, Caroline A. Plummer, for the calendar years 1939 and 1940.

"Affiant personally gave his attention to the preparation of said returns. In connection therewith, affiant made inquiry of the said Sanford Plummer relating to the community status of property and income of himself and wife. Said Sanford Plummer advised affiant that substantially all of his property constituted community property and he desired to know the distinction between community property acquired prior to July 29, 1927, and community property acquired subsequent to that date.

"Affiant advised Sanford Plummer that community property acquired prior to July 29, 1927, was treated, for Federal and State income tax purposes, as property in which the wife had only an expectancy and that income derived on such property, for Federal and State income tax purposes, was treated as though it constituted the income of the husband. Affiant also advised said Sanford Plummer that community property acquired subsequent to July 29, 1927, exclusive of income derived after that date on community property acquired prior to that date, constituted community property in which husband and wife had equal interests under the provisions of Section 161(a) of the Civil Code. Affiant outlined the policy followed by the Treasury Department and the California Franchise Tax Commissioner in

determining what constituted community property and income acquired subsequent to July 29, 1927.

"Said Sanford Plummer advised affiant that according to the best of his information, a substantial part of his estate consisted of community property acquired subsequent to July 29, 1927. He advised that his former tax adviser had carefully considered this matter and that the Treasury Department had conceded that 20% of his income from dividends and interest constituted community property in which he and his wife had equal one-half interests and that the remainder of the income constituted community income taxable to Sanford Plummer. Said Sanford Plummer advised affiant that, in his opinion, more than 20% of his estate constituted community property in which he and his wife had vested interests. He advised, however, that he did not desire to have further tax controversies or arguments with either the Treasury Department or the State Franchise Tax Commissioner relating to his personal income tax liabilities and those of Mrs. Plummer. According to his instructions, affiant was to treat 20% of the income derived from dividends and interest as community income divisible equally between said Sanford Plummer, and Caroline A. Plummer, his wife. The remainder of the income from these securities was to be treated as community income taxable to said Sanford Plummer. Affiant followed this procedure in preparing the Federal and State income tax returns of Sanford Plummer and of Caroline A. Plummer for the years 1939

and 1940. Pursuant to affiant's conference with Sanford Plummer, affiant did not make an independent investigation in order to determine the community status of property and income owned by said Sanford Plummer.

"There is a note in the files of John F. Forbes & Company to the effect that Revenue Agents' Reports for the years 1935 to 1937 classified 20% of the income received on stocks and bonds as income divisible equally between said Sanford Plummer and Caroline A. Plummer. In light of this fact and of information submitted to affiant by said Sanford Plummer, affiant followed the procedure of classifying 20% of income received on investments in stocks and bonds as divisible community income in filing the income tax returns of Sanford Plummer and Caroline A. Plummer for the years 1939 and 1940."

On September 17, 1939, the decedent executed a will (R. 7-8), the second paragraph of which provided as follows, (R. 8):

> Second. I do hereby declare that all of the property owned or possessed by me has been acquired since my marriage to my wife, Caroline Alice Plummer, and the whole thereof is community property of myself and my wife, Caroline Alice Plummer.

After the decedent's death, proceedings in administration of his estate were had in Superior Court and on August 11, 1942, a decree of distribution of the estate was regularly made, filed and entered in the

records of the proceedings. (R. 5.) Among other things, the decree contained the following provisions (R. 8-9):

> The Court finds that in Paragraph Second of said Will, the said testator declared that all of the property owned or possessed by him had been acquired since his marriage to his wife, Caroline Alice Plummer, and that the whole thereof was the community property of himself and his said wife, Caroline Alice Plummer, which said declaration of said deceased is confirmed by this Court.
>
> The Court finds that the said testator, under the provisions of paragraph Third of his said Will, confirmed the right of his surviving wife, Caroline Alice Plummer, upon his death, to receive one-half of all the community property and by way of confirming the same, said testator gave, devised and bequeathed to his said wife, Caroline Alice Plummer, the said one-half portion of the said community property.
>
> The Court further finds that the Honorable A. T. Shine, the duly appointed, qualified and acting Inheritance Tax Appraiser of this estate, has filed a report in this estate, which report is now on file herein, wherein it is found by the said Inheritance Tax Appraiser that all of the estate of said deceased was and is the community property of said deceased and his said surviving wife, Caroline Alice Plummer. This Court confirms the said report of the said Inheritance Tax Appraiser that all of the estate of said deceased was and is the community property of said deceased and his said surviving wife, Caroline Alice Plummer.

> The Court therefore further finds that the said Caroline Alice Plummer is entitled to receive and to have distributed to her one-half of the estate of said deceased, without any deduction therefrom by reason of the payment or discharge of any of the legacies or devises created by the provisions of Paragraphs Fourth and Fifth and the various subparagraphs of Paragraph Fifth of said Will.

The District Court's ultimate finding of fact was as follows (R. 19):

XVI.

> Not more than twenty per cent of the gross estate of Sanford Plummer, deceased, consisted of community property acquired by himself and his wife subsequent to July 29, 1927, in which she had a present or "vested" interest at the time of his death.

The judgment of the District Court dismissing the action (R. 24-25) is explained in the District Court's "Order for Judgment" (R. 20-21) and was based upon the following conclusions of law (R. 22):

I.

> The provisions of the will of Sanford Plummer, deceased, did not amount to an agreement between himself and Caroline Alice Plummer, converting either his separate property or their community property acquired prior to July 29, 1927, into the type of California community property in which the wife held a present or "vested" interest within the meaning of Section 161(a) of the California Civil Code.

II.

That not more than twenty per cent of the gross estate of Sanford Plummer, deceased, consisted of California community property of the type defined by Section 161(a) of the California Civil Code.

* * * * * * *

SUMMARY OF ARGUMENT.

Appellant's contention that one-half of the decedent's property is excludible from his gross estate for estate tax purposes is based solely upon the contention that paragraph Second of the decedent's will constituted an agreement between the decedent and his wife which operated, as of the date of execution of the will, to convert their "old type" community property into "new type" community property. However, paragraph Second of the will simply states that the property owned or possessed by the decedent had been acquired since his marriage and was community property. That is merely a statement of a fact which is corroborated by other evidence. It does not purport to state of what type, or what portion of each type, the community property consisted. Thus, if the paragraph constituted an agreement between the decedent and his wife, the agreement was simply that the decedent's property was all community property—that he had no separate property.

Actually, the paragraph in the will could not legally constitute an agreement between the decedent and

his wife. Mutual consent is a requisite to an agreement converting "old type" community property into "new type" community property and there is no showing in the record that the wife even had knowledge of the provisions of the decedent's will prior to his death. Moreover, the will operated only as of the time of the decedent's death and paragraph Second could therefore have been changed. Accordingly, even if the wife had consented to the paragraph, no binding agreement resulted. Appellant's argument to the contrary is that the statement in a will of an existing fact cannot be changed. That argument ignores that appellant is relying on paragraph Second as constituting an agreement which changed an existing fact—that is, which changed "old type" into "new type" community property—and not merely as evidence of an existing fact or of some other written or oral agreement relative to conversion of "old type" into "new type" community property. The existing fact which paragraph Second states is simply that the property owned or possessed by the decedent had been acquired since his marriage and was community property. The statement of that fact obviously does not support appellant's contention that the paragraph constituted an agreement which operated to convert their "old type" into "new type" community property as of the time the decedent executed his will.

ARGUMENT.

PARAGRAPH SECOND OF THE DECEDENT'S WILL DID NOT OPERATE TO REQUIRE THE EXCLUSION OF ONE-HALF OF THE COMMUNITY PROPERTY OF DECEDENT AND HIS WIFE FROM THE DECEDENT'S GROSS ESTATE UNDER SECTION 811(a) OF THE INTERNAL REVENUE CODE.

As this Court stated in *Rogan v. Delaney,* 110 F. (2d) 336, 337, certiorari denied, 311 U.S. 660:

> Formerly, in California, the wife's interest in community property was not a present existing interest, but was a mere expectancy. * * * Now, by § 161a of the Civil Code (added by Stats. 1927, c. 265, p. 484, effective July 29, 1927), it is provided: "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband * * *." But § 161a does not apply to community property acquired before July 29, 1927, * * *; nor to property received in exchange for or purchased with the proceeds of such community property, * * *; nor to income derived therefrom, * * *.
>
> Thus, in California, there are two types of community property: (1) Community property in which the wife has a present existing interest and (2) community property in which the wife has no such interest. * * *

Ordinarily, for federal estate tax purposes under Section 811(a) of the Internal Revenue Code, *supra,* the pre-1927, or "old type", community property is includible in its entirety in the husband's gross estate. *Gump v. Commissioner,* 124 F. (2d) 540 (C.A. 9th),

certiorari denied, 316 U.S. 697; *United States v. Goodyear,* 99 F. (2d) 523, 524 (C.A. 9th). Such community property, may however, be converted into post-1927, or "new type" community property by agreement between husband and wife. *United States v. Goodyear, supra; Schwartz v. United States,* 70 F. Supp. 437 (S.D. Cal.); *Bank of America Nat. Trust & Savings Ass'n v. Rogan,* 33 F. Supp. 183 (S.D. Cal.) If validly converted into "new type" community property, only one-half thereof is includible in the husband's gross estate for estate tax purposes. *United States v. Goodyear, supra; Bank of America Nat. Trust & Savings Ass'n v. Rogan, supra.* The husband's separate property is of course includible in his gross estate in its entirety. Income tax consequences follow the same pattern. The husband is taxable on the income from his separate property and on all income from "old type" community property *(United States v. Robbins,* 269 U.S. 315), but is taxable on only one-half of the income from "new type" community property. (*United States v. Malcolm,* 282 U.S. 792.)

The present case involves an estate tax deficiency resulting from the Commissioner's determination that only 20 percent of the decedent's estate consisted of "new type" community property. That determination was based upon the fact that in 1938 and 1939 the decedent had filed individual income tax returns in which he reported only 20 percent of the income received by him on investments from stocks and bonds

as community income divisible with his wife; that is, as income from "new type" community property. (R. 17-18.)

Appellant contends that the decedent's entire estate consisted of "new type" community property and that, therefore, only one-half thereof is includible in his gross estate. The contention is based solely upon an argument that paragraph Second of the decedent's will constituted an agreement between the decedent and his wife which operated to convert their "old type" community property into "new type" community property as of the date the will was executed, September 17, 1939. Paragraph Second of the decedent's will provided as follows (R. 8):

> Second. I do hereby declare that all of the property owned or possessed by me has been acquired since my marriage to my wife, Caroline Alice Plummer, and the whole thereof is community property of myself and my wife, Caroline Alice Plummer.

The District Court concluded as a matter of law that this provision did not amount to an agreement between decedent and his wife converting either the decedent's separate property (if any) or their "old type" community property into "new type" community property. (R. 22.) The single inquiry here, as appellant concedes (Br. 6-7), is as to the correctness of that conclusion.

It should be noted at the outset, however, that the record does not show that the decedent ever had any

separate property and that, therefore, there is no basis for a contention by appellant (whether or not made) that paragraph Second of the decedent's will converted separate property into "new type" community property. When Scott Dunham was preparing the decedent's income tax return for either 1938 or 1939, the decedent advised him "that substantially all of his property constituted community property". (R. 14.) At the same time the decedent desired to know, and Dunham explained to him, the distinction between community property acquired prior to July 29, 1927, and community property acquired subsequent to that date. (R. 14-15.) During the conversation the decedent also instructed Dunham to report only 20 percent of his income from dividends and interest as community property divisible with his wife, and thus as income from "new type" community property, in accordance with the Treasury Department's determination in that connection, although he was of the opinion that "more than 20% of his estate" constituted community property in which his wife had a *vested* interest.[2] (R. 15.) Thus,

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[2]Appellant has not attempted to prove that this opinion of the decedent was correct. The contention here, as previously stated, is that the decedent's estate consisted entirely of "new type" community property by virtue of paragraph Second of the decedent's will.

The decedent's 1938 and 1939 income tax returns contained statements to the effect that he contended that one-half of the income from dividends and interest was derived from "new type" community property (R. 13) but appellant does not rely on these statements, they are inconsistent with the decedent's statements to Dunham, and in any event they are irrelevant to the question whether the decedent had any separate property.

irrespective of paragraph Second of the decedent's will, which may not at that time have been executed, and regardless of what portion of community property in fact constituted "new type" community property, the decedent considered that substantially all of his property was community property. In the probate proceedings with respect to his estate, the Probate Court found that *all* of the decedent's estate consisted of community property. (R. 9.) This finding was based on a report by an inheritance tax appraiser, not on paragraph Second of the decedent's will. Indeed, the Probate Court apparently regarded paragraphs Second and Third of the will as simply confirming the right of decedent's wife to receive one-half of their community property *upon the decedent's death* (R. 8-9)—a right which the wife had as to both "old type" and "new type" community property.[3] Accordingly, the inquiry here is limited to whether paragraph Second of the decedent's will operated to convert "old type" into "new type" community property as of the date of execution of the will.

Paragraph Second of the decedent's will does not even purport to reflect an intention to transform "old type" into "new type" community property. It

[3]Perhaps because it was unnecessary to the administration of the estate the Probate Court made no determination as to what part of the decedent's estate constituted "old type" and what part constituted "new type" community property. The fact that the Probate Court determined that the decedent's estate was constituted entirely of community property does not, of course, preclude the inclusion of more than one-half of it in the decedent's gross estate for estate tax purposes. *Gump v. Commissioner*, 124 F. (2d) 540 (C.A. 9th), certiorari denied, 316 U. S. 697.

merely states a fact—that all of the decedent's property had been acquired since his marriage (which occurred in 1904) and was community property. Obviously, therefore, the paragraph provides no basis for appellant's argument that it operated to transform "old type" into "new type" community property.

Nor is there any other basis in the record for a conclusion that the decedent intended the paragraph to have the effect for which appellant argues. The implications are the other way. If the conversation between the decedent and Dunham in connection with the preparation of the decedent's income tax returns for 1938 and 1939, referred to above, occurred prior to the execution of the decedent's will on September 17, 1939, the decedent was well aware of the distinction between the two types of community property before he executed his will and certainly would have been more explicit in paragraph Second if he had intended it to transform "old type" into "new type" community property. If the conversation occurred after the decedent had executed his will on September 17, 1939, which, however, is unlikely, it is apparent that the decedent did not think he had already converted the "old type' into "new type" community property by the provisions in paragraph Second. He instructed Dunham to report 20 percent of his income from dividends and interest as community income divisible with his wife although he was of the opinion that "more than 20% of his estate" (not one-half)

constituted community property in which he and his wife had *vested* interests. (R. 15.)

Assuming contrary to fact that paragraph Second indicates an intention on decedent's part to convert "old type" into "new type" community property, the pargaraph was legally ineffective for that purpose. Sections 158, 159 and 160 of the California Civil Code authorize such a conversion but only by an agreement between husband and wife as to which the mutual consent of the parties is a sufficient consideration. *Helvering v. Hickman,* 70 F. (2d) 985, 986 (C.A. 9th); *Anderson v. Commissioner,* 78 F. (2d) 636, 639 (C.A. 9th); *Schwartz v. United States,* 70 F. Supp. 437 (S.D. Cal.); *In re Freitas,* 16 F. Supp. 557 (S.D. Cal.); *Siberell v. Siberell,* 214 Cal. 767, 770; *Estate of Watkins,* 16 Cal. (2d) 793, 797, 108 P. (2d) 417, and cases there cited. The instant record does not show that the decedent's wife was ever aware of the provision in paragraph Second of the decedent's will prior to the decedent's death. It follows that mutual consent is lacking here[4] and it does not aid appellant to rely upon decisions (Br. 14-15) in which there was evidence of an agreement between the parties. Moreover, the decedent's will was unilateral and therefore

[4]It is futile for appellant to argue (Br. 11-13) that the law supplies the wife's consent because the declaration in paragraph Second was beneficial to her. While a conveyance may ordinarily be presumed to be accepted by the donee (see Br. 12-13), a transformation of "old type" into "new type" community property can be accomplished only by agreement and mutual consent of the parties and paragraph Second could not constitute an agreement between the decedent and his wife when she had no knowledge of the paragraph.

operative only as of the time of his death and subject to change until that time.[5] Hence, it would be immaterial even if the wife had knowledge of paragraph Second. She could have done no more than assent to its provisions as effective upon the decedent's death. The paragraph resulted in no agreement which was binding upon either party prior to the decedent's death and appellant does not contend that there was any other written or oral agreement between the decedent and his wife of which paragraph Second is evidence.

Appellant argues that paragraph Second was binding and could not be changed (Br. 16-19), but there is no merit to the argument. It is premised upon the assumption that the paragraph referred to an actually existing fact and that assumption ignores that appellant is relying upon the paragraph as constituting an agreement between the parties, and thus as changing the previous status of property, not as evidence of or as a statement of an actually existing fact. Actually, as already noted, the paragraph does indeed state an actually existing fact, but that fact is simply that all of the decedent's property consisted of community property, not that it consisted of "new type" community property. The question here is whether the

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[5]In this respect the case is different from *Estate of Watkins*, 16 Cal. (2d) 793, 108 P. (2d) 417, relied upon by appellant (Br. 14), which involved joint wills and where, as appellant stated (Br. 14-15), "the status of the community property of the parties to the marriage became fixed and final, and not subject to change, except by the mutual agreement, written, or oral, of the husband and wife".

"old type" community property was converted into "new type" community property through an agreement between the decedent and his wife, and there is nothing in the record to show that it was.

CONCLUSION.

The decision of the District Court is correct and should be affirmed.

Dated, San Francisco, California,
March 20, 1950.

Respectfully submitted,

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